



Commonwealth of Massachusetts State Ethics Commission

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SUFFOLK, ss.

**COMMISSION ADJUDICATORY
DOCKET NO. 610**

**IN THE MATTER
OF
DAVID CARIGNAN**

DISPOSITION AGREEMENT

This Disposition Agreement is entered into between the State Ethics Commission and David Carignan pursuant to Section 5 of the Commission's *Enforcement Procedures*. This Agreement constitutes a consented-to order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On September 23, 1998, the Commission initiated, pursuant to G.L. c. 268A, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Carignan. The Commission has concluded its inquiry and, on August 23, 2000, found reasonable cause to believe that Carignan violated G.L. c. 268A, §23.

The Commission and Carignan now agree to the following findings of fact and conclusions of law:

1. Carignan is, and was at all times here relevant, the Falmouth health agent. Carignan was appointed to this full-time, salaried position by the Falmouth Board of Health ("Board of Health") in 1982.
2. In June 1997, Duco Associates, Inc. ("Duco"), foreclosed on a property (including land and an unfinished house) located at 10 Brantwood Road, Falmouth, as to which Duco was the first mortgagee. Duco hired a contractor, Margaret Fitzgibbon, who completed the house. A buyer for the house was found and a closing was scheduled for September 26, 1997.
3. Because 10 Brantwood Road was a newly constructed house, a certificate of occupancy and compliance ("occupancy certificate") issued by the Falmouth Building Department ("Building Department") was required to proceed with the closing. An occupancy certificate for a new house is normally issued by the Building Department after several municipal departments, including the Board of Health, sign their approval on the building permit card.
4. One of Carignan's duties as health agent is to sign, or to authorize an assistant to sign, building permit cards on behalf of the Board of Health. Carignan's practice is not to sign, or authorize the signing of, the building permit card until he has received an "as-built card" showing the location of the septic system as installed.^{1/} According to Carignan, his practice is to require that the as-built card be prepared by the installer of the septic system based upon Carignan's understanding of Title 5, the state code of regulations dealing with septic systems.^{2/} Carignan has, however, discretion as health agent to deviate

from this practice in appropriate circumstances. For example, Carignan can (and indeed must under Title 5) accept an as-built card from the septic system designer in place of one from the installer.

5. The septic system at 10 Brantwood Road, designed by the Falmouth engineering firm Ferreira Associates, was installed by Falmouth excavation contractor and town-licensed septic system installer Carl F. Cavossa, Jr., pursuant to a March 30, 1995 Board of Health permit. The system was inspected and approved in compliance with Title 5 by the Board of Health on July 1, 1996, nearly one year prior to Duco's taking the property by foreclosure.

6. At the time of the foreclosure, Cavossa had not been paid for his installation of the septic system at 10 Brantwood Road. The builder upon whom Duco foreclosed owed Cavossa several thousand dollars for the work. Duco, in taking the property by foreclosure, did not legally owe Cavossa anything for his work at 10 Brantwood Road.

7. As of September 1997, no as-built card had been filed with the Board of Health for the 10 Brantwood Road septic system. Duco's contractor, Fitzgibbon, attempted to obtain the as-built card from Cavossa. Fitzgibbon offered Cavossa \$500 for the card. Cavossa refused Fitzgibbon's offer and told Fitzgibbon that he wanted to be paid what he had lost on the 10 Brantwood Road septic system installation before he would provide the as-built card.

8. Because of Cavossa's refusal to provide the as-built card, Fitzgibbon paid another licensed septic system installer \$150 to go to 10 Brantwood Road, locate the septic system components with the aid of the original design plans, and prepare a substitute as-built card.

9. On September 23, 1997, Fitzgibbon took the substitute as-built card for the 10 Brantwood Road septic system to the Board of Health's office. Carignan, however, refused to accept the substitute as-built card. Fitzgibbon then told Carignan that she previously had submitted a substitute as-built card for another new house in Falmouth to the Board of Health under similar circumstances and the card was accepted. Carignan responded that the earlier substitute as-built card had been accepted in error and that he would only accept an as-built card for the 10 Brantwood Road septic system prepared by the system installer, Cavossa. Fitzgibbon then told Carignan that she had offered Cavossa \$500 for the card and Cavossa had refused to provide it. Carignan responded by telling Fitzgibbon that the Board of Health would not sign the building permit card unless he was provided with an as-built card from Cavossa.

10. According to Carignan, after talking with Fitzgibbon he telephoned Cavossa and asked for the as-built card for 10 Brantwood Road. Cavossa told Carignan that he would not provide the card because he had not been paid for his work at 10 Brantwood Road. Carignan took no further action to obtain the as-built card from Cavossa.

11. Fitzgibbon reported her conversation with Carignan to Duco's attorney, Stuart N. Cole. On September 24, 1997, Cole telephoned Carignan and asked him why the Board of Health had not signed the building permit card for 10 Brantwood Road so that the occupancy certificate could be issued by the Building Department. Carignan responded by stating his position that an as-built card from the original installer, Cavossa, must be provided to the Board of Health before the Board would sign off on the issuance of the occupancy permit. Carignan and Cole then discussed the fact that Cavossa had not been paid for his work at 10 Brantwood Road and was refusing to provide the as-built card unless he were paid. Carignan stated words to the effect that it was unfair and immoral that Cavossa had not been paid for his work. Cole attempted to explain to Carignan that Cavossa was not owed payment for his work by Duco, but by the builder upon whom Duco had foreclosed. The conversation then ended and Cole informed Fitzgibbon of the conversation's substance.

12. Based upon their respective conversations with Carignan, Fitzgibbon and Cole reasonably understood (a) that Carignan believed that Duco should compensate Cavossa for his work at 10 Brantwood Road, and (b) that the Board of Health would not sign off on the issuance of the occupancy permit unless Duco paid Cavossa to provide the as-built card to the Board.^{3/}

13. As a result of the above-described conversations between Carignan and Fitzgibbon and Cole, Cole contacted Cavossa and subsequently negotiated with Cavossa and Cavossa's attorney to have Cavossa provide the as-built card in return for Duco's payment of \$2,500, plus Duco's general release of Cavossa from all liability.

14. On September 26, 1997, Duco paid Cavossa \$2,500 and provided him with the general release. Cavossa then delivered the as-built card for 10 Brantwood Road to the Board of Health. Carignan thereupon signed or authorized an assistant to sign the 10 Brantwood Road building permit card on behalf of the Board of Health. The Building Department then issued the occupancy certificate for 10 Brantwood Road.

15. Apart from telephoning Cavossa, Carignan did not take any action as health agent to assist Duco and its representatives, Fitzgibbon and Cole, in satisfying Carignan's requirement that a septic system as-built card for 10 Brantwood Road be submitted to the Board of Health before the Board would sign the building permit card. First, Carignan did not offer Fitzgibbon or Cole any way of obtaining the Board of Health's building permit card sign-off other than obtaining and submitting an as-built card from Cavossa. Carignan did not, for example, inform Fitzgibbon that he could, in his discretion as health agent, accept an as-built card from the engineering firm that had designed the 10 Brantwood Road septic system.^{4/} Second, Carignan did not inform Fitzgibbon or Cole that Duco could appeal Carignan's actions to the Board of Health.^{5/} Finally, Carignan did not bring to bear any official pressure on Cavossa, as a town-licensed septic system installer, to submit the as-built card to the Board of Health.^{6/}

16. As Falmouth health agent, Carignan is a municipal employee as defined in G.L. c. 268A, §1. As such, Carignan is subject to the provisions of the conflict of interest law, G.L. c. 268A.

17. Section 23(b)(2) of G.L. c. 268A prohibits a municipal employee from, knowingly or with reason to know, using or attempting to use his official position to secure for himself or anyone else unwarranted privileges or exemptions of substantial value which are not properly available to similarly situated individuals.

18. Carignan's above-described actions and failures to act as health agent, under the then-existing circumstances, caused and compelled Duco to pay Cavossa money for the 10 Brantwood Road as-built card that it did not owe. Under the circumstances, and regardless of his motive in acting and failing to act as he did, Carignan had reason to know that his conduct as health agent would force Duco to pay Cavossa money that it did not owe in order to obtain the as-built card from Cavossa that Carignan insisted the Board of Health receive before it would sign off on the building permit for the issuance of the occupancy permit for 10 Brantwood Road.

19. Carignan's above-described conduct as health agent in effect secured for Cavossa a special advantage in Cavossa's dealings with Duco concerning the amount that Duco would have to pay Cavossa for the as-built card. This advantage was a privilege within the meaning of G.L. c. 268A, §23(b)(2) and was of substantial value in that it was the leverage that helped Cavossa obtain from Duco \$2,000 more for the as-built card than originally offered by Fitzgibbon. The advantage was further unwarranted and not properly available to similarly situated persons because a private citizen, like Cavossa, does not have any right or other lawful claim to Carignan's help as health agent in obtaining payment from any other private citizen, particularly under circumstances where no payment is legally owed.

20. Therefore, Carignan, as health agent, by his above-described conduct, effectively and with reason to know, used his official position to secure for Cavossa an unwarranted privilege of substantial value which was not properly available to similarly situated individuals. In so doing, Carignan violated G.L. c. 268A, §23(b)(2).^{7/}

21. Section 23(b)(3) of G.L. c. 268A prohibits a municipal employee from, knowingly or with reason to know, acting in a manner which would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy the employee's favor in the performance of the employee's official duties, or that the employee is likely to act or fail to act as a result of kinship, rank, position or undue influence of any person or party. Section 23(b)(3) further provides that the section is not violated if the employee "has disclosed in writing to his appointing authority ... the facts which would otherwise lead to such a conclusion."

22. Carignan, by his above-described actions and omissions as health agent, which caused and compelled Duco to pay Cavossa \$2,500 that it did not owe, acted, with reason to know, in a manner which would cause a reasonable person, with knowledge of the relevant circumstances, to conclude that Cavossa could unduly enjoy Carignan's favor in the performance of his official duties. In so doing, Carignan violated G.L. c. 268A, §23(b)(3).^{8/}

In view of the foregoing violations of G.L. c. 268A by Carignan, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Carignan:

- (1) that Carignan pay to the Commission the sum of \$1,000 as a civil penalty for violating G.L. c. 268A; and
- 2) that Carignan waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceeding to which the Commission is or may be a party.

DATE: December 27, 2000

^{1/}The as-built cards required and accepted by Carignan are typically three by five inch index cards with, on one side, a diagram of the septic system with distances shown to the house foundation and, on the other side, the property address, the names of the installer and the town inspector, the permit number, the lot number, the septic tank and leaching sizes, the ground water level, the number of bedrooms, whether there is a disposal, whether there is town water or a private well, and the date the system was installed. The as-built cards are not signed.

^{2/}Title 5 in fact contains no requirement for the installer's submission of an as-built card. Title 5 instead requires that the installer and designer each "certify in writing on a form approved by the Department that the system has been constructed in compliance with [Title 5], the approved design plans and all local requirements, and that any changes to the design plans have been reflected on *as-built plans* which have been submitted to the approving authority *by the Designer* prior to the issuance of a Certificate of Compliance" (emphasis added). 310 CMR 15.021(3). According to Carignan, he requires the as-built card from the installer based upon Title 5's requirement that the septic system installer make the certification set forth above. The as-built cards required and accepted by Carignan do not, however, contain any certification language and, as stated above, are not signed.

^{3/}According to Carignan, he did not intend his statements to be so understood. The Commission makes no finding as to Carignan's actual motives, as no such finding is required for the resolution of this matter.

^{4/}As set forth in footnote 1 above, Title 5, to the degree it requires a septic system "as-built," requires "as-built plans" submitted by the system designer.

^{5/}According to Carignan, although he would normally have informed Cole and Carignan of Duco's right to appeal his action to the Board of Health, he did not do so because his conversations with them were heated and adversarial.

^{6/}As the local licensing and permitting authority for septic system installers (including Cavossa) and septic system installations, respectively, the Board of Health has the power to require installers to comply with Title 5 and local regulations, including the certification requirement of 310 CMR §15.021(3) (which under Carignan's practice was met by the installer's submission of the as-built card) under threat of possible sanctions including the loss of license or the denial of further permits to install septic systems. Thus, Carignan, as health agent, was in a position to compel Cavossa to provide the Board of Health with the as-built card for 10 Brantwood Road. According to Carignan, however, he did not see it as part of his role as health agent to in any way pressure Cavossa to provide the as-built card.

^{7/}This is true even if Carignan did not intend to help Cavossa because Carignan had reason to know that, under the circumstances, his actions and omissions as health agent would have the effect of helping Cavossa.

^{8/}Carignan did not make the disclosure to his appointing authority required to avoid a violation of G.L. c. 268A, §23(b)(3).